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JUDICIAL CAMPAIGN SPEECH AND THE THIRD LAW OF MOTION

STEVEN LUBET*

[A] person does not surrender his constitutional right to freedom of speech when he becomes a candidate for judicial office.
—Hon. William H. Stafford, 1990[1]

For every action, there is an equal and opposite reaction.
—Newton's Third Law of Motion, 1687[2]

[A certain judge is an] evil, unfair witch.
—Attorney Sean Conway, 2007[3]

We have come a long time indeed from the days of the second Justice John Marshall Harlan (1955–1971), who was said to have refrained from voting in presidential and other elections for fear of prejudicing his neutrality in deciding cases.[4] Today, state and federal judges at all levels are far more outspoken about their political and social views—writing books, making speeches, and granting interviews with the press. The greatest turn toward volubility has been in the realm of state judicial elections.

Once relatively staid affairs, characterized largely by decorum and near invisibility, judicial elections have lately become ever more expensive and hard fought, generating pitched ideological battles over questions of judicial philosophy. In this increasingly politicized atmosphere, it is now common for judicial candidates to boast of their "pro-business" or "anti-crime" credentials and to announce their views on legal issues ranging from punitive damages to abortion rights.

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1. ACLU of Fla., Inc. v. Fla. Bar, 744 F. Supp. 1094, 1097 (N.D. Fla. 1990).

2. ISAAC NEWTON, PHILOSOPHIÆ NATURALIS PRINCIPIA MATHEMATICA [MATHEMATICAL PRINCIPLES OF NATURAL PHILOSOPHY] 14 (3d ed. 1726) (1687), *reprinted in* 1 ISAAC NEWTON'S *Principia* 55 (Alexandre Koyré & I. Bernard Cohen eds., Harvard Univ. Press 1972).

3. Jordana Mishory, *Judge-Blasting Lawyer Fights Investigation*, LEGAL INTELLIGENCER, Dec. 21, 2007, at 4.

4. *See* LAWRENCE S. WRIGHTSMAN, THE PSYCHOLOGY OF THE SUPREME COURT 190 (2006) (quoting BOB WOODWARD & SCOTT ARMSTRONG, THE BRETHREN 127 (1979)).

For many years, the Code of Judicial Conduct[5] (CJC) exercised a strong moderating influence on judicial campaigns. First promulgated by the American Bar Association in 1972 and eventually adopted (although often in modified form) by every state, the CJC provided that a judicial candidate must not "make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office; [or] announce his views on disputed legal or political issues."[6] Many judicial candidates—both incumbents and challengers—chafed under the CJC's restraints, arguing that they were constitutionally entitled to speak their minds in the course of judicial elections.[7] Eventually, that position achieved critical mass, as academic commentators and judges alike took up the banner of "free speech for judges." Finally, in 2002, the United States Supreme Court decided *Republican Party of Minnesota v. White*, ruling that the so-called "announce" clause was indeed unconstitutional as applied to electoral campaigns.[8] Current versions of the Code of Judicial Conduct prohibit only "pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of judicial office," and then only if they touch upon "cases, controversies, or issues that are likely to come before the court."[9] But even that limitation has been challenged.[10]

Thus, we have entered a new era of judicial free speech, in which incumbents and candidates for judicial office are permitted—indeed, encouraged—to state their views rather bluntly regarding law-related controversies. In some states, judicial elections have begun to resemble ordinary political campaigns, as candidates compete for votes (and contributions) as though they were running for legislative or executive offices. Many of the old guard have grumbled at this development, but the change is clearly here to stay. In the wake of the Supreme Court's *White* decision, judicial candidates have constantly pushed the envelope, asserting broader and broader interpretations of the right to judicial campaign speech and usually prevailing in court.

5. MODEL CODE OF JUDICIAL CONDUCT (2007). There have been three full versions of the *Model Code of Judicial Conduct*, promulgated by the American Bar Association in 1972, 1990, and 2007. Some version of the *Model Code*—whether modified or *in toto*—has been adopted in every state, as well as by the United States Judicial Conference.

6. MODEL CODE OF JUDICIAL CONDUCT Canon 7B(1)(c) (1972).

7. *See, e.g.*, Buckley v. Ill. Judicial Inquiry Bd., 997 F.2d 224 (7th Cir. 1993).

8. Republican Party of Minn. v. White, 536 U.S. 765, 788 (2002).

9. MODEL CODE OF JUDICIAL CONDUCT R. 4.1(A)(13) (2007).

10. *See, e.g.*, Ind. Right to Life v. Shepard, 507 F.3d 545 (7th Cir. 2007).

The purpose of this short essay is not to discuss the wisdom of wide-open judicial campaigns (though I think they are regrettable) or to address the constitutionality of various states' attempts to hold the line (which appear mostly doomed to fail). Instead, I will simply point out that every action has an equal and opposite reaction, and that judges' collective embrace and enjoyment of unfettered campaign speech will not come without some unpleasant consequences. Those who live by free expression may die by free expression, and judges should not be surprised if they soon find themselves on the receiving end of verbal assaults that were once considered well off limits.

I. AN INCOMPLETE BUT BASICALLY ADEQUATE HISTORY OF JUDICIAL CAMPAIGN SPEECH

In the early years of the Republic, there was no judicial campaign speech, simply because there were no judicial elections. Federal judges, of course, have always been nominated by the President subject to the advice and consent of the Senate. And while Supreme Court confirmation hearings have lately taken on many of the nastier trappings of electoral campaigns, that is a recent phenomenon, dating only to the Robert Bork nomination in 1987 or the Thurgood Marshall nomination in 1967 (depending on one's political perspective). Less well known is the fact that nearly all state court judges were also appointed (in some states by the governor and in others by the legislature) until the early 1830s.

Only with the advent of Jacksonian democracy did there come a call for the popular election of state court judges, on the theory that elected judges would be less dominated by entrenched powers and more accountable to the public. The Indiana Constitution of 1816 provided for the election of certain lower court judges.[11] In 1832, Mississippi became the first state to elect all of its judges.[12] Other states followed suit, including New York in 1846, and by 1860, twenty-four of the thirty-four states elected their judges.[13] In 1909, thirty-five states (out of forty-six) chose judges in partisan elections.[14] The early twentieth century

11. LARRY C. BERKSON & RACHEL CAUFIELD, AM. JUDICATURE SOC'Y, JUDICIAL SELECTION IN THE UNITED STATES 1 (2005), *available at* http://www.ajs.org/selection/docs/Berkson.pdf.

12. *Id.*

13. *Id.*

14. Charles Gardner Geyh, *The Endless Judicial Selection Debate and Its Implications for the Future of an Independent Judiciary* 4 (Indiana Univ. Sch. of Law-Bloomington Legal Studies Research Paper No. 85, 2007), *available at* http://ssrn.com/abstract=1012963.

also saw the beginning of a reaction against party-dominated elections, as about a dozen states (including Illinois) experimented with non-partisan elections.[15] In 1940, Missouri became the first state to go a step further, adopting a system of commission recommendation and gubernatorial appointment, followed by a "retention ballot," in which the judge runs unopposed. Variations on the "Missouri Plan" are now in use for some judicial offices in thirty-three states; another five states use gubernatorial or legislative appointment without commission recommendations.[16]

Today, thirty-nine states elect some or all of their judges (including retention elections) while eleven states and the District of Columbia use exclusively appointive systems.[17] The nature of judicial campaigns can vary as widely as the methods of selection, though of course they tend to be the most hotly contested and expensive in the twenty-one states (eight partisan and thirteen nonpartisan) that elect the judges of their highest courts.[18]

Elected judiciaries have always generated controversies, which have sometimes been far reaching. In the spring of 1860, for example, the Republican Party of Ohio declined to re-nominate Joseph R. Swan, then the sitting chief justice of the state's supreme court, because he had declined to issue a writ of habeas corpus for two men convicted in federal court of violating the Fugitive Slave Act.[19] Such a ruling would have resulted in a confrontation between state and federal courts, which was much desired by ardent abolitionists but dreaded by moderate Unionists. Ohio's Republican governor, Salmon P. Chase, waffled on the issue. At one point he announced that he would enforce a state-court-issued writ of habeas corpus, even against federal marshals, but he later supported Swan's decision to defer to federal authorities in fugitive slave cases.[20] The electoral abandonment of Chief Justice Swan split the Ohio Republican Party, which in turn meant that Chase was not able to lead a united delegation to the party's national nominating convention in Chicago. When

15. Berkson & Caufield, *supra* note 11, at 2.

16. *Id.* at 2.

17. *See* ELMO B. HUNTER CITIZENS CTR. FOR JUDICIAL SELECTION, AM. JUDICATURE SOC'Y, JUDICIAL SELECTION IN THE STATES: APPELLATE AND GENERAL JURISDICTION COURTS (2007), http://www.ajs.org/selection/docs/Judicial%20Selection%20Charts.pdf.

18. *See id.* at 3.

19. ERIC FONER, FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY BEFORE THE CIVIL WAR 136–37 (1995).

20. *See* Steven Lubet, *Slavery on Trial: The Case of the Oberlin Rescue*, 54 ALA. L. REV. 785, 826 (2003).

the leading candidate, William H. Seward of New York, could not gain a majority on the first ballot, Chase might otherwise have been the logical nominee. As it was, however, the united Illinois delegation succeeded in swinging the nomination to Abraham Lincoln.[21]

In 1913, William Howard Taft (former president and later Chief Justice of the United States) condemned judicial elections as "shocking, and . . . out of keeping with the fixedness of moral principles."[22] A decade later, Chief Justice Taft chaired the American Bar Association's Committee on Judicial Ethics, which produced the first Canons of Judicial Ethics in 1924. Although the Canons were for the most part aspirational and hortatory, they came down firmly on the side of limiting campaign speech: "A candidate for judicial position should not make or suffer others to make for him, promises of conduct in office which appeal to the cupidity or prejudices of the appointing or electing power; he should not announce in advance his conclusions of law on disputed issues . . . ."[23]

The Canons' political speech restriction was not considered controversial in 1924, and it was carried over (in somewhat less precatory language) in the American Bar Association's 1972 Code of Judicial Conduct, where the limitation remained for the next two decades.[24]

II. NEW RIGHTS FOR OPPRESSED JUDGES

In the early 1990s, it became increasingly common for judicial candidates to challenge the strictures of the Code of Judicial Conduct. One of the first successful challengers was Illinois appellate court Justice Robert Buckley, who, in his campaign for a seat on the state's supreme court, had circulated literature stating that he had "never written an opinion reversing a rape conviction."[25] Interpreting Buckley's statement as a pledge of conduct, the Illinois Court Commission sanctioned him pursuant to Illinois Supreme Court Rule 7(B)(1)(c), which, at that time, was Illinois's version of the Code of Judicial Conduct.[26] Although no penalty was imposed on Buckley for the violation, he brought

21. DORIS KEARNS GOODWIN, TEAM OF RIVALS 248–49 (2005).

22. William Howard Taft, *The Selection and Tenure of Judges*, 7 ME. L. REV. 203, 208 (1914) (originally presented at a meeting of the American Bar Association, Sept. 1–3, 1913).

23. ABA CANONS OF JUDICIAL ETHICS Canon 30 (1924).

24. *See* MODEL CODE OF JUDICIAL CONDUCT Canon 7 (1972).

25. Barbara E. Reed, *Tripping the Rift: Navigating Judicial Speech Fault Lines in the Post-*White *Landscape*, 56 MERCER L. REV. 971, 974 (2005).

26. Illinois Supreme Court Rule 67(B)(1)(c) then provided that:

suit in federal court to enjoin future enforcement of the provision. The Seventh Circuit agreed with Buckley, holding that the Illinois rule reached "far beyond speech that could reasonably be interpreted as committing the candidate in a way that would compromise his impartiality should he be successful in the election," and was therefore constitutionally overbroad.[27]

Similar cases were brought in other jurisdictions, with mixed success for the challengers. In the meantime, many states modified their campaign speech limitations, frequently adopting the revised language of the 1990 Code of Judicial Conduct, which had dropped the "announce" clause, while retaining the prohibition on "pledges and promises."[28] Nine states, however, including Minnesota, retained the "announce clause,"[29] thus setting the scene for *Republican Party of Minnesota v. White*, which reached the United States Supreme Court in 2002.

In *White*, the Supreme Court held simply that the Minnesota rule "prohibiting candidates for judicial election from announcing their views on disputed legal and political issues violates the First Amendment."[30] Although the Court specifically declined to opine on other common campaign speech restrictions, it was obvious that *White* had altered the landscape of judicial free speech. Much litigation ensued.

In *Weaver v. Bonner*,[31] for example, the Eleventh Circuit extended *White*'s holding to the "misrepresent" clause by invali-

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> [A] candidate, including an incumbent judge, for a judicial office filled by election or retention . . . should not make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office; announce his views on disputed legal or political issues; or misrepresent his identity . . . or other fact; provided, however, that he may announce his views on measures to improve the law, the legal system, or the administration of justice, if, in doing so, he does not cast doubt on his capacity to decide impartially any issue that may come before him.

Buckley v. Ill. Judicial Inquiry Bd., 997 F.2d 224, 225 (7th Cir. 1993) (striking down this rule).

27. *Id.* at 228.

28. Canon 5(A)(3)(d) of the 1990 *Code* provides that judges and candidates may not,

> with respect to cases, controversies, or issues that are likely to come before the court, make pledges, promises or commitments that are inconsistent with the impartial performance of the adjudicative duties of the office [or] knowingly misrepresent the identity, qualifications, present position or other fact concerning the candidate or an opponent.

MODEL CODE OF JUDICIAL CONDUCT Canon 5(A)(3)(d) (1990).

29. Reed, *supra* note 25, at 982.

30. Republican Party of Minn. v. White, 536 U.S. 765, 788 (2002).

31. Weaver v. Bonner, 309 F.3d 1312 (11th Cir. 2002).

dating a Georgia Supreme Court rule that prohibited "material misrepresentation[s] of fact or law"[32] with regard to the positions of a candidate's opponent. Likewise, in *Family Trust Foundation of Kentucky v. Kentucky Judicial Conduct Commission*, the Sixth Circuit applied *White*'s rationale to uphold an injunction against Kentucky's "pledges and promises" and "commit" clauses, which had been adapted from the 1990 *Code of Judicial Conduct*.[33] The following year, a federal district judge in North Dakota reached the same conclusion: "There is little question," said the court, "that the 'pledges and promises clause,' and the 'commitment clause' contained in Canon 5(A)(3)(d)(i) and (ii) essentially forbid the same speech that the United States Supreme Court held was constitutionally protected in *White*, namely, speech announcing views on disputed legal and political issues."[34] The Eighth Circuit, considering the remaining issues in *White* on remand from the Supreme Court, went even further and invalidated Minnesota's restrictions on partisan political activities and direct fundraising by judicial candidates.[35]

Some courts have not read *White* so broadly,[36] declining to extend its holding to provisions such as the "pledges" and "com-

32. Georgia Code of Judicial Conduct Canon 7(B)(1)(d) provided that a candidate

> shall not use or participate in the use of any form of public communication which the candidate knows or reasonably should know is false, fraudulent, misleading, deceptive, or which contains a material misrepresentation of fact or law or omits a fact necessary to make the communication considered as a whole not materially misleading or which is likely to create an unjustified expectation about results the candidate can achieve.

Id. at 1315.

33. Family Trust Foundation of Ken. v. Ken. Judicial Conduct Comm'n, 388 F.3d 224, 228 (6th Cir. 2004). Kentucky Supreme Court Rule 4.300 provided that

> [a] judge or a candidate for election to judicial office . . . shall not make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office; shall not make statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court; and shall not misrepresent any candidate's identity, qualifications, present position, or other facts.

Id. at 227.

34. N.D. Family Alliance v. Bader, 361 F. Supp. 2d 1021, 1039 (D.N.D. 2005).

35. Republican Party of Minn. v. White, 416 F.3d 738 (8th Cir. 2005) (en banc).

36. *E.g.*, Spargo v. N.Y. State Comm'n on Judicial Conduct, 351 F.3d 65 (2d Cir. 2003); Griffen v. Ark. Judicial Discipline and Disability Comm'n, 130 S.W.3d 524 (Ark. 2003); *In re* Kinsey, 842 So. 2d 77 (Fla. 2003); *In re* Dunleavy, 838 A.2d 338 (Me. 2003); *In re* Watson, 794 N.E.2d 1 (N.Y. 2003).

mitments" clauses, both of which were retained in the ABA's 2007 revision of the *Model Code of Judicial Conduct*.[37] Nonetheless, the movement has essentially been in one direction, as was aptly summarized by Professor Charles Geyh: "In the aftermath of *White*, judicial candidates have challenged remaining restrictions on their campaign speech and conduct in the lower courts, and while the results have been somewhat mixed, the trend has favored the challengers."[38]

III. FREE SPEECH AND OTHER UNINTENDED CONSEQUENCES

Perhaps the apogee of judicial free speech has been the Fifth Circuit's decision in *Jenevein v. Willing*, in which the court appeared to have applied *White* to almost anything a judge might want to say.[39] A Texas trial court judge named Robert Jenevein had been censured by the state's Commission on Judicial Conduct for holding a televised press conference in his chambers, at which he "read a prepared statement concerning [a pending case] and his personal feelings and criticisms about the conduct of [one of the lawyers] and his clients in connection with that still-pending case," in violation of the Texas Code of Judicial Conduct.[40] Citing *White*, the Fifth Circuit ordered the Texas Commission to expunge the order of censure on the ground that Judge Jenevein's televised remarks—which were extensive and quite personal—had been protected by the First Amendment.[41]

This ruling is significant because it extended *White* well beyond the specific context of campaigning. Although no election was in process at the time of Jenevein's press conference, the Fifth Circuit determined that it nonetheless constituted an "elected official's speech to his constituency" and therefore fell

37. Rule 4.1 of the 2007 *Model Code of Judicial Conduct* provides that candidates for judicial office shall not "knowingly, or with reckless disregard for the truth, make any false or misleading statement" and "in connection with cases, controversies, or issues that are likely to come before the court, make pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of judicial office." MODEL CODE OF JUDICIAL CONDUCT R. 4.1(A) (2007).

38. Geyh, *supra* note 14, at 12.

39. Jenevein v. Willing, 493 F.3d 551 (5th Cir. 2007).

40. *Id.* at 556. Specifically, Judge Jenevein was censured pursuant to Texas Canon 2B, which provides that a "judge shall not lend the prestige of judicial office to advance the private interests of the judge or others." TEXAS CODE OF JUDICIAL CONDUCT Canon 2B (2006). The Fifth Circuit held that this amounted to a speech restriction as applied to Judge Jenevein's televised comments. *Jenevein*, 493 F.3d at 562.

41. *Jenevein*, 493 F.3d at 560.

within the ambit of *White*.[42] In other words, it would appear that elected judges are always campaigning, at least for the purpose of applying the *White* decision. If followed by other courts, the *Jenevein* approach would make it unlikely that sitting judges could ever be subjected to speech restrictions of any sort.[43]

While the total demise of speech limitations may gladden hearts on the bench, the theory of open communications between officials and their constituents would also result in some disagreeable consequences for the judiciary. Consider Rule 8.2(a) of the Model Rules of Professional Conduct, which has been adopted in most states and provides that "[a] lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge . . . or of a candidate for election or appointment to judicial or legal office."[44]

Judges have not been hesitant in the past to apply this rule to disrespectful attorneys, on the theory that judicial dignity requires lawyerly deference. The Indiana Supreme Court, for example, suspended a young lawyer for the trivial (in my opinion) offense of including an impolite (though not insulting, again in my opinion) footnote in an appellate brief.[45] In *In re Pyle*, the Kansas Supreme Court suspended a lawyer who had mailed a letter to several hundred friends, clients, and family members claiming that a prior disciplinary proceeding had been "stacked against" him.[46] The letter, according to the Kansas court, had constituted "false statements of fact about Board members' qualifications and integrity."[47] In *In re De Maio*, the District of Columbia Court of Appeals suspended a lawyer for the "false, spurious, and inflammatory" statement that a judge had "refus[ed] to administer the law" and had violated his "oath of office."[48] In all, Rule 8.2(a) appears to have been invoked by reviewing courts at least several dozen times since 2000, and that

42. *Id.* at 558.

43. The Fifth Circuit did leave open the possibility that Jenevein could be properly censured for conducting the press conference in his courtroom while wearing his judicial robe. *Id.* at 560.

44. MODEL RULES OF PROF'L CONDUCT R. 8.2(a) (2003). A minority of jurisdictions have adopted versions of the previous *Model Code of Professional Responsibility*, in which Disciplinary Rule 8-102(A) is to the same effect.

45. *See In re* Wilkins, 777 N.E.2d 714 (Ind. 2002), *modified on reh'g*, 782 N.E.2d 985 (Ind. 2003) (suspending attorney Michael Wilkins for thirty days for misconduct). The court subsequently lifted the suspension, while maintaining the finding of misconduct.

46. *In re* Pyle, 156 P.3d 1231, 1235 (Kan. 2007).

47. *Id.* at 1244.

48. *In re* De Maio, 893 A.2d 583, 585 (D.C. 2006).

does not count cases that resulted in informal sanctions or private reprimands, much less situations where lawyers bit their lips for fear of facing discipline.

Most recently, a Florida lawyer-blogger named Sean Conway was served with a disciplinary complaint for referring to a state trial judge as an "evil, unfair witch" with an "ugly, condescending attitude" and suggesting that she is "seemingly mentally ill."[49] Those are vicious words, indeed, hardly calculated to win friends among the judiciary. In the pre-*White* days, there would have been a plausible argument in favor of disciplining Conway, on the theory that the state has a compelling public interest in preventing slurs against its judges. Florida judges are elected, however, and in the post-*Jenevein* era it seems obvious that "constituents" are entitled to speak their minds regarding "elected officials," even if they are not in the midst of a campaign.

From here, it is likely that life will only become more heated, both for judges and their critics, as judicial campaigns, extracurricular press conferences, and blogs go to ever further extremes. There can be few if any rules, now that codes of conduct (both judicial and lawyerly) have been either invalidated or sapped. Ladies and gentlemen of the bench—whether you are ugly and unfair, or photogenic and just—welcome to the marketplace of ideas.

49. Mishory, *supra* note 3, at 4.